TUAN HAJIMUSTAPHA KAMAL BIN HAJI ABU DAKAR

v.

ABDUL KADIR BIN ENDUT AND ROKIAH BTE. BABA (CLAIMANT)

HIGH COURT, KUALA LUMPUR
DATO'V.C. GEORGE J.
[APPLICATION FOR EXECUTION NO. 37-165-1991]
29 JUNE 1993

EXECUTION: Writ of seizure and sale - Goods seized from defendants house - Defendant's wife filing notice of claim in respect of all the items seized - Appeal against SAR's finding in favour of the claimant on the interpleader summons.

The plaintiff obtained final judgment against the defendant and sought to execute the judgment by way of a writ of seizure and sale. The bailiff seized certain items from the premises stated on the writ of seizure and sale. The claimant, the wife of the judgment debtor, contended that she was the rightful owner of the items seized and sought their return. The SAR found in favour of the claimant and the plaintiff appealed. The claimant also appealed for costs of the proceedings before the SAR.

Held:

[1] In a case of this nature, at the interpleader stage, the burden should initially be on the judgment creditor to prove on a balance of probabilities that the goods seized were properly identified as being that of the judgment debtor and only if he succeeds in doing that does the burden shift.

[2] The judgment creditor had not laid the foundation for any presumptive ownership in the judgment debtor in respect of the goods seized.

[3] The judgment creditor had not proved that the goods belonged to the judgment debtor and in any event the claimant has proved on a balance of probability that the seized furniture and microwave oven had been purchased by her and as such they belonged to her and not to the judgment debtor. She has also shown that the air-conditioners were not that of the judgment debtor.

[4] As for the argument that the doctrine of Harta Sepencarian would give the claimant at

least a half share in the goods, the doctrine may be invoked only when permitting the pronouncement of talaq and when making an order of divorce and as the marriage between the claimant and the judgment debtor was subsisting at all material times, the invocation of the doctrine was misconceived.

[5] The claimant having succeeded in her claim before the SAR, she should have been awarded the costs of the proceedings.

[Plaintiffs appeal dismissed with costs. Claimant's appeal allowed with costs].

Cases referred to:

Overseas Investment (P) Ltd. v. Anthony William O'Brien &Anor. [1988] 2 CLJ 238 ***(refd)***

Roberts alias Kama.rulza.man v. Ummi Kalthom [1966] 1 MLJ163 ***(refd)***

Boto' binti Taha v. Jaafar bin Muhamad [1985] 2 MLJ 98 ***(refd)***

Legislation referred to:

Islamic Family Law (Federal Territory) Act 1984, ss. 2, 57

For the plaintiff - Christie Soosay Nathan; M/s. Christie Soosay Nathan & Associates

For the Claimant - Shamsuddin bin Hj. Nawawi; M/s. Shamsuddin & Co.

JUDGMENT

V.C. George J;

On 1 June 1990 in Civil Suit No. D3-22-1439-89 the plaintiff, Tuan Haji Mustapha Kamal bin Haji Abu Bakar, obtained a final judgment against the defendant, Abdul Kadir bin Endut, for RM 150,000, said to be the amount that had been lent by the plaintiff to the defendant as a "friendly loan". The judgment carried interest at 8% per annum calculated from 18 October 1987 (when the loan should have been repaid) until realisation. Costs were also ordered.

A writ of seizure and sale was caused to be issued by the judgment creditor on 1 October 1991 by which the Sheriff of the Court was commanded to seize property which would be identified by or on behalf of the plaintiff as belonging to the said judgment debtor.

Neither the praecipe for the writ nor the writ of seizure and sale specified or identified the property to be seized. However the address of the judgment debtor was given on the writ as No. 28, Jalan 4A Ampang Jaya, Selangor.

The bailiff of the Court went to that address on 8 October 1991 and purported pursuant to the writ of Execution to seize various items of household furniture, two air-conditioners and a microwave oven all of which, according to the notice of seizure and sale filed by him as encl. (5) in the Court file, had been pointed out and identified to him as being that of the judgment debtor by the representative of the (plaintiff's) solicitor/representative of the plaintiff ("oleh wakil peguam/wakil plaintiff"). The name of the "solicitor/plaintiff" is given as "Shan". Who and what "Shan" is is far from clear. The basis on which "Shan" purported to identify the goods he had pointed out to the bailiff as being that of the judgment debtor is not stated anywhere. It would seem that the only basis relied on by "Shan" for identifying the goods as that of the judgment debtor is that the address at which the goods were is the home of the judgment debtor.

The claimant who is the wife of the judgment debtor filed a notice of claim in respect of all the items seized. She points out that the address where the seizure was effected is her home as well and contends that she is the rightful owner of all items seized, save the two air-conditioners which she points out is that of the landlord of the premises.

The Senior Assistant Registrar held an enquiry in respect of the goods seized on the interpleader summons and found in favour of the claimant.

The claimant had originally depended on a receipt in respect of payment made by her in respect of the microwave oven and on what was held out to be delivery orders in respect of the furniture. The "delivery orders" turned out to have been written out for the purposes of the case apparently based on the saleswoman's recollection of what had happened some years earlier when the goods were purchased allegedly by the claimant. However, at the enquiry itself what was held out to be copies of the original delivery notes were produced. These delivery notes appear to be genuine carbon copies of the original and show that the goods referred to in them were indeed sold to the claimant in October 1987.

It was suggested that there was no nexus between the goods in the delivery orders and the goods seized by the bailiff. Here we have a problem in that the delivery orders were in English and the goods were described therein in

English whereas the bailiffs list is in Malay and a the goods described in Malay.

There is however the claimant's affidavits and testimony on oath that the goods seized save the air-conditioners and the microwave oven were those she had purchased from a shop called Hana Marcini. The saleswoman-partner of that shop who had handled the sale was called by the judgment creditor and she in fact supported the testimony of the claimant and as has been seen produced carbon copies of the original delivery orders in respect of all the furniture that had been sold to the claimant.

The claimant had testified that she earned an independent income but she could not provide any evidence of such earning. However she had also testified that her husband provided her with an allowance to run their household. The testimony of the vendor of the furniture was to the effect that payment for the furniture purchased by the claimant was by monthly instalments of RM500 each and the delivery orders themselves state that to be the position. Looking at the earnings of the husband - income tax returns for 1989 were before the Court - it is seen that he was assessed at RM107,000 for that year and there can be no doubt at all that he could well afford to give a substantial allowance to his wife and it seems to me that there is nothing inherently improbable about her ability to pay RM500 a month for the furniture and to pay for the microwave oven she had purchased. No doubt there is no evidence before the Court of the husband's income for 1987. However if he earned RM107.000 in 1989 it is more than probable that he was earning sufficient amounts two years earlier to enable him to give his wife a substantial allowance during that period as well, for running the household. Support for this assessment of the situation is also provided by fact that the cause of the action in which the judgment creditor obtained judgment in the sum of RM150.000 was said to be a "friendly loan of RM150,000" made to the judgment debtor in October 1986 and which was repayable in 12 months. It seems highly improbable that the judgment creditor would have given such a loan without security to a poor person.

I had the benefit of reading the judgment of Shankar J. in *Overseas Investment (P) Ltd. v. Anthony William O'Brien & Anor.* [1988] 2 CLJ 238. At p. 240 is this passage:

> The plaintiff attached these goods and had them sold on the basis that the goods belonged to the defendant. But what evidence was there to support that contention? None whatsoever except the say-so of the plaintiffs solicitors in the writ of Seizure and Sale. The plaintiff did not file any affidavit to contradict the affidavits filed by the claimant. Where a case is to be decided on a contest of affidavits the rule is clear. Material allegations which are not contradicted are deemed to be admitted. *See Tynte v. Buller* [1954] 23 LJ Ch. 504; 2 WR 309. At the hearing, the claimant's oral evidence that she was the sole owner of the goods was also unchallenged.

Almost the identical situation obtains in the instant case. As had happened in *O'Brien's* case, I also hold that the judgment creditor here had also not laid the foundation for any presumptive ownership in the judgment debtor in respect of the goods seized. Unlike what happened there, the Senior Assistant Registrar here found in favour of the claimant.

I would go so far as to lay down that in this type of cases, at the interpleader stage, the burden should initially be on the judgment creditor to proveon abalance of probabilities that the goods seized were properly identified as being that of the judgment debtor. It is only if he succeeds in doing that that the burden shifts. I do not think that these kind of cases should be resolved on a "show cause why the goods should not be treated as that of the judgment debtor" basis as appears to be more often than not done. Here at least the irate housewife having her goods seized from her possession knew of the seizure when it occurred and could and did protest by laying a claim for them. But what about goods that are, say, on hire-purchase? And what about furniture and household goods belonging to the landlord of the premises rented to the judgment debtor - the air-conditioning units here is a case in point? In the manner in which these seizures appears to be effected, neither hire-purchase companies nor lessors of equipment nor landlords and other real owners of goods seized from households are informed of the seizure. Registrars and Magistrates dealing with this kind of interpleader summons must ensure that the movables seized are not those of persons who may not be aware of the fact of the seizure.

In the instant case in respect of the air-conditioners the response by the judgment creditor to the claimant pointing out that the air-conditioners belong to the landlord was that since she is not the owner and the landlord was not there to make a claim the Court should not release the

air-conditioners. The judgment creditor would have the officers of the Court sell the air-conditioners theproceeds to be utilised to reducing the judgment debt.

I know of one case in Seremban where personal effects left with a friend were seized by the judgment creditor of the friend and eventually sold by the Court. The judgment debtor had been either too embarrassed or unconcerned to let the owner of the goods know of the attachment.

In my judgment this appeal should be dismissed on the grounds that in the first place the judgment creditor had not proved that the goods belonged to the judgment debtor and in any event the claimant has proved on a balance of probability that the seized furniture and microwave oven had been purchased by her and as such they belonged to her and not to the judgment debtor. She has also shown that the air-conditioners were not that of the judgment debtor. The relevant orders will be made after I have dealt with another aspect of the case.

As a second string to his bow, En. Shamsuddin of Counsel for the claimant submitted that in any event the doctrine of Harta Sepencarian would give the claimant at least a half share in the goods. He relied on *Overseas Investment (P) Ltd, v. Anthony O'Brien (supra).* With regret I do not think I should follow the views expressed there in respect of Harta Sepencarian.

The definition given to harta sepencarian in s. 2 of the Islamic Family Law (Federal Territory) Act 1984 read with s. 57 of the Act suggests that the doctrine may be invoked only when permitting the pronouncement of talaq and when making an order of divorce. In *Roberts alias Kamarulzaman v. Ummi Kalthom* [1966] 1 MLJ 163 Raja Azlan Shah J. (as he then was) discussed the doctrine as applied in the various States of the country and concluded at p. 165F that it is only applicable to a divorced spouse:

> A principle gleaned from these cases established that harta sapencharian is a matter of Malay 'adat and is applicable **only** to the case of a divorced spouse who claims against the other spouse during his or her lifetime (emphasis provided); this rule of law is local law of which the Court must take judicial notice and it is the duty of the Court to propound it: see *Ramah v. Laton, supra.* In the face of the compelling authorities above, I am of the view that once it is clearly established that property was acquired subsequent to the marriage out of their joint resources or by their joint efforts a presumption arises that it is harta sapencharian.

In *Boto' binti Taha v. Jaafar bin Muhamad* [1985] 2 MLJ 98 which was cited, the invocation of the doctrine was also on divorce. Salleh Abas, CJ (as he then was) said at p. 100 of his report:

> For the purpose of this judgment it is not necessary for me to do a survey of this principle as practised and observed in Malaysia as this task was admirably done by Raja Azlan Shah J. (as he then was) in Roberts @ Kamarulzaman v. Ummi Kalthom [1966] 1 MLJ 163.

In the instant case at all relevant times the marriage between the claimant and the judgment debtor was subsisting and accordingly the invocation of the doctrine is misconceived.

However for the reasons given in the earlier part of this judgment the appeal encl. (32) should be and is dismissed with costs.

In respect of encl. (28), the claimant's appeal for the costs before the Senior Assistant Registrar, it seems to me clear that having succeeded in the claim she should have been awarded costs. The appeal encl. (28) is allowed with costs here and below.